No. 3803

United States
Circuit Court of Appeals
For the Ninth Circuit

M. LAMBERT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error

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ADDITIONAL STATEMENT OF FACTS.

Supplementing the recital of facts made by Plaintiff in Error, in his statement of the case, it is deemed advisable to add thereto, that the transcript of record discloses that C. R. Edison, a witness called on behalf of the Defendant in Error, testified as follows:

That he first saw Lambert and his automobile at Dick Brights' Tavern, about thirty miles from Reno, Nevada. That Lambert was coming out of the Tavern and had a whisky bottle in his hand which contained a liquid that looked like whisky and this bottle was deposited by Lambert in his car just before leaving the Tavern for Reno.

After the arrival of Lambert and his Locomobile in Reno, Edison went into the Grand Buffet (a soft-drink parlor) and while there, overhead a conversation between Ed. Regan, proprietor, and Lambert, wherein Regan stated to Lambert: "That he could not and would not handle that kind of stuff", and something was said by Lambert that Regan could have it for twenty.

All this information was obtained prior to the seizure of the liquor in the car.

GOVERNMENT'S CONTENTION.

A reading of the testimony in the case establishes beyond cavil that the officers, making the seizure in the automobile, had sufficient information to establish probable cause, by affidavit, for the issuance of a search warrant. However, it is our contention in this case that the establishment of probable cause by affidavit and the issuance of a search warrant, to search the car and seize the intoxicating liquor, is not necessary and that the seizure of the liquor in this case was fully authorized under Section 26, Title II, of the National Prohibition Act.

We do not dispute the abstract principles of law stated by Plaintiff in Error and contained in his

Brief under points numbered two, three and four, but we are unable to understand just how these principles of law are applicable to the facts in this case.

It is admitted that the search of one's person, his home, his papers or effects, without a valid warrant, is illegal, and that evidence so obtained cannot be used in a criminal charge growing out of the arrest of such person. This principle is elementary.

But this is not a case where the facts disclose that ones person, or home was searched and we respectfully submit, that a reading of the transcript will disclose that no actual search was made of the automobile, but rather, it was discovered by the officers that Lambert was unlawfully transporting intoxicating liquor within the provision of Section 26, Title II, of the National Prohibition Act.

Counsel does not contend that acts of officers in seizing the liquor and arresting the defendant were not authorized under Section 26, Title II of the National Prohibition Act. It being deemed, therefore, that this section authorizes such procedure, it must logically follow that to warrant a reversal of this case the burden is upon the Plaintiff in Error to establish:

(a) That the officers in making the seizure and arrest exceeded the authority conferred upon them under this section, or

(b) That Section 26, Title II of the National Prohibition Act is unconstitutional.

Under subdivision "a" as we have already stated, it is not contended and no complaint is made that the officers were not authorized by

Section 26 to do what they did, and therefore, the only issue presented to the Court is whether Section 26 is constitutional.

POINTS AND AUTHORITIES.

Counsel under point V of his Brief, enumerates two theories which are claimed as justification by the Government for the seizure of liquor and arrest of defendant.

We differ with counsel on his assumption that we would rely upon either of these theories as a justification or authority for our acts. Under subdivision "A" of Point V a recital of certain facts is made wherein is set forth the knowledge and information imparted to the arresting officers by Edison which tends to establish the belief that defendant was transporting liquor in his car. It is then urged that this showing, or rather these facts, were insufficient to warrant the issuance of a search warrant.

The lawfulness of the seizure in this case is not to be determined by the same rule of law which authorizes the issuance of a search warrant. Such a construction would absolutely nullify the provisions of Section 26, Title II of the National Prohibition Act.

The facts imparted to the officers by Edison constitute what may be termed "discovery" under this section that the liquor was being unlawfully transported.

Under Subdivision "B" of Point V it is urged that we justify the arrest of Lambert upon the theory that he was engaged in committing a crime

in the presence of the officers. We base our authority for the seizure and arrest upon Section 26, Title II, of the National Prohibition Act, which provides:

> "When the Commissioner, his assistants, inspectors, or any officer of law shall discover any person in the act of transporting in violation of law, intoxicating liquors in any wagon, automobile * * * it shall be his duty to seize any and all intoxicating liquor found therein being transported contrary to law. Whenever intoxicating liquors transported, or possessed illegally, shall be seized by an officer, he shall take possession of the vehicle and team or automobile * * * AND SHALL ARREST ANY PERSON in charge thereof."

We respectfully contend that under the facts as disclosed in the transcript in this case, the officers were justified and warranted in seizing the intoxicating liquors at that time being unlawfully transported by Lambert and were justified and warranted in arrest Lambert as is authorized in the foregoing section.

In our opinion the only portion of the Brief filed by Plaintiff in Error material to the issue, to be decided in this case, is the contention set forth under subdivision VII of said Brief.

Here it is earnestly contended by counsel that if the provisions of Section 26, Title II of the National Prohibition Act, give to the officers the right to arrest without a warrant any one found unlawfully transporting liquor and to seize without a search warrant intoxicating liquor so unlawfully transported, that the section is unconstitutional for

the reason that it contravenes the Fourteenth Amendment to the Constitution of the United States.

In support of this contention there is cited the case of Ex Parte Rhodes; 1st A.L.R., 568. This case, decided by the Supreme Court of Alabama, held that a Municipal Corporation could not, in view of the constitutional provision guaranteeing due process of law, authorize the arrest of a person upon a mere verbal charge of a citizen to a police officer. Attention is invited to the fact, that the same Court, in the case of Maples vs. the State, 82 Southern, page 183, held that an Act of the Legislature of the State of Alabama passed January 25th, 1919, which provided that, "Any Sheriff or arresting officer who becomes cognizant of the facts or who finds liquor in such conveyance or vehicle being illegally transported shall seize the same", was not a violation of the Constitution in reference to unreasonable seizures and that Court, at page 184 of the decision stated:

> "It is first insisted the provisions of said section as to seizure are violative of Section V of our Constitution as to unreasonable seizure. The Act provides that the Sheriff or arresting officer who becomes cognizant of the facts, or who finds liquor in such conveyance or vehicle being illegally transported as aforesaid, shall seize the same, and clearly, this is not in violation of such constitutional provision. THE CASE OF EX PARTE RHODES 79 SOUTHERN 462, 1st A.L.R., 568, CITED BY COUNSEL FOR APPELLANT IS NOT AT ALL AT VARIANCE WITH THIS CONCLUSION."
>
> (Maples vs. State; 82 Southern, 183).

It will be seen, therefore, that while the Alabama Court held in the Ex Parte Rhodes case that an ordinance providing the arrest of a person without a warrant was unconstitutional, it also decided that the Act of the Legislature which provides for the seizure of liquor unlawfully transported was not in contravention of the constitutional provision.

The Supreme Court of the United States, while not directly determining the validity of a Statute, which provides for the seizure of liquors, yet by inference seems to convey the impression that while the seizure without such provision was unlawful, if the seizure was authorized by the Statute, it would be valid. This question came before the Court in the case in re Swan, petitioner. The Court states:

" 'In some of the States authority to proceed in respect of liquors without warrant in the first instance is expressly given by Statute, but is accompanied by the provision that when the seizure is so made the property seized is to be kept in safety for a reasonable time until a warrant can be procured and it is held that should the officer neglect to obtain a warrant within such time, he will be liable as a trespasser. Kent vs. Willey; 11 Gray 368; Wesston vs. Carr, 71 Me. 356.'

"In Kennedy vs. Favor, 14 Gray, 200, Chief Justice Shaw states:

" 'The authority to seize liquors without a warrant, though sometimes necessary, is a high power and being in derivation of the common law right, it is to be exercised only where it is

clearly authorized by the Statute or rule of law which warrants it.'"

(Re Swan, 150 U.S. 637; 37 L. Ed. 1207).

Counsel also cites the case of in re Kellam, 41 Pacific, 960. In this case the Court holds that a Statute which authorizes the arrest of an individual without a warrant for an offense which is not committed in his presence, was violative of the constitutional provision. We respectfully submit that this case is not in point, and involves a factor, not an issue in this case.

The case of Youman vs. the Commonwealth of Kentucky, 224 Southwestern, 860, is urged as sustaining Plaintiff in Error's theory that Section 26 of the National Prohibition Act is unconstitutional. The reading of the facts in this case discloses that the officers, without a search warrant, or statutory or any authority entered the premises and residence of Youman and made a search and found under the floor of a small house, several gallons of whisky, which they took and carried away and the Court held that this search of the plaintiff's residence and premises was unlawful and unwarranted.

It will be seen, therefore, that counsel has cited no authority directly bearing upon the point relied upon by him to sustain a reversal, to-wit: That Section 26, Title II of the National Prohibition Act is unconstitutional.

The Federal Courts in at least two of the districts have had occasion to pass upon Section 26, Title II of the National Prohibition Act. In the case of the United States vs. Crossen, 264 Federal, 459, at page 462, the Court states:

"The careful analysis of the Act makes it apparent that in no case is a prohibition officer or agent justified in seizing intoxicating liquor or other property without a search warrant except as provided in Section 26 which makes it his duty to seize all intoxicating liquors found being transported contrary to law in a wagon, buggy, automobile, water or air-craft, or other vehicle."

We respectfully call the Court's attention to the case of the United States vs. Fenton, (District Court of Montana,) 268 Federal at 221. The facts in this case are very similar to the facts in the instant case and the Court announces this doctrine in deciding the case:

"Defendants were taken in commission of a misdemeanor, if not of a felony. Whether or not, in the circumstances of time, place, common knowledge of whisky running, information of the officers, and the incident of the arrest, the misdemanor was committed 'in the presence' of the officers (see In re Morrill (C.C.) 35 Fed. 267, and 5 Corp. Jur. 416), whether or not defendants were subject to arrest without process as at common law, as night walkers or prowlers reasonably subject to suspicion, whether or not the officers had reasonable grounds to believe defendants had committed a felony, whether or not the arrest and search are lawful, or either or both amendments violated, defendants' motions must be denied.

"An unlawful arrest of an offender does not work a pardon in his behalf, and seizure without process and by force of government property, of which it is entitled to immediate possession, does not entitle the offender to a return of the property, nor to exclusion of its use in evidence

against him. The auto and whisky, by virtue of the National Prohibition Act (41 Stat. 305), were forfeited, and thereby transferred to the United States, the moment defendants embarked upon the unlawful transportation. The United States was then vested with the right of property and possession. Even as any other owner of property in like circumstances at common law, the United States without process could recover possession by force. And however, if at all, irregularly the officers proceeded, the defendants have no right to return of the property, nor to object to its use in evidence, whatever other, if any, right or remedy they may have. See U.S. v. Stowell, 133 U.S. 16, 10 Sup. Ct. 244, 33 L. Ed. 555, and cases; Taylor v. U.S., 3 How. 205, 11 L. Ed. 559; Boyd v. U.S., 116 U.S. 623, 6 Sup. Ct. 524, 29 L. Ed. 746.

"Silverthornes Case, 251 U.S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, and cases therein cited, apply to search and seizure of the offender's papers and property and use thereof in evidence, and not to those of others, of which the offender has unlawful possession. The first violates both amendments; the second, neither, so far as return of the seized articles and their exclusion as evidence are concerned."

It might be said that a search or seizure may be reasonable, or unreasonable and we respectfully submit that the provisions of Section 26, Title II, of the National Prohibition Act does not authorize what might be termed to be an unreasonable search. As was stated by the Supreme Court of Kentucky in the case of Commonwealth vs. Marcum 24 L.R.A., New Series, page 1194 at 1197:

"The question as to whether a search or

seizure of the person of a citizen is reasonable under the Constitution is a relative one. It might not be reasonable to seize or to search the person of a citizen for a misdemeanor where he was at large in the city or country and where the circumstances would generally be such that a warrant could be secured in advance of the arrest, but it would not be reasonable to require the officers to wait for a warrant if the offense was a felony, because here the gravity of the offense and the importance to the public of the prompt seizure of the criminal overrides the unreasonableness of the search or seizure without a warrant. And so, in the case at bar, the circumstances which require the arrest of an offender against the statute are such as to make it reasonable that a peace officer should be authorized, upon the request of the conductor of a train, to arrest a violator without a warrant, and without the offense for which the arrest was to be made being done in the presence of the officer. The law, being a practical science, regards the necessities of the case, the danger to the public, and the opportunity for the escape of the offender, and arranges the remedy so as to protect the innocent, trespassing upon the liberty of the citizen as little as possible in order to secure the protection of the public. No law, therefore, can be considered unreasonable which is necessary to protect the public from violence or outrage at the hands of the lawless. And, if such a law seems to give an undue amount of absolute authority into the hands of the officers having in charge its administration, it must be remembered that this is the price that the people pay for protection; for, after all, government is but the sum total of the natural liberty of the citizen surrendered up in return for law and order and peace and safety."

Would it not be absurd to assert that if a prohibition officer met an automobile in the country twenty miles from a United States Commissioner, or Justice of the Peace and discovered intoxicating liquor being unlawfully transported, that it would be necessary for him to go before a United States Commissioner and obtain a search warrant before they could seize the liquor? And if this would be an absurd proposition can it be said that a provision of law which authorizes the seizure of such liquor, being unlawfully transported, without a warrant is an unreasonable provision? In the language of the Supreme Court of Kentucky, can it not be urged, "Because the gravity of the offense and the importance to the public of the prompt seizure without a warrant"?

In the case of the State vs. Quinn, 3 A.L.R. 1500 97 Southeastern, 62, the Supreme Court held that no unconstitutional search occurs where a police officer, on approaching the side of an automobile in which some of the occupants are drunk, seizes the bottles containing whisky in the car, and seizes the liquor and arrests the occupants of the car, although he had no warrant for such procedure.

We respectfully contend that in the instant case the testimony does not disclose that a search was made. As to what constitutes a search the case of State vs. Quinn is appropriate. The Court stated:

> There was no search in the instant case, for search implies invasion and quest and that implies some sort of force, actual or constructive, much or little. * * * The undisputed testimony in the case shows there was no exercise of

any sort of force, but on the contrary, the contrary condition was manifest to him who had eyes to see."

A Statute which provides that in all cases where an officer may seize intoxicating liquors or vessels containing them upon a warrant, he may seize the same without a warrant and keep them in some safe place for a reasonable time until he can procure such a warrant, does not contravene the constitutional provision against unreasonable searches and seizure since it merely authorizes the seizure without a warrant when such seizure can be made without the unreasonable search which is prohibited by the constitution.

State vs. McCann, 59 Me. 383;
State vs. LeClair, 86 Me., 522; 30 Atlantic, 7;
State vs. Bradley, 51 Atlantic, 816.

A Statute which authorizes officers without a warrant to arrest any person whom they may find in the act of illegally selling, transporting or distributing intoxicating liquors and to seize the liquors * * * and retain them in some place of keeping until warrants can be procured for the trial of the person and the seizure of the liquors, is constitutional.

Jones vs. Root, 6 Gray, 435. (Mass.-
Mason vs. Lathrop, 7 Gray, 354. (Mass.)

The Constitutional provision against unlawful seizures and searches is not violated by a statute which gives an officer the power to seize, without

a warrant, liquor found under circumstances warranting the belief that it is intended for sale or distribution, contrary to law, but which does not purport to confer the power of search.

State vs. O'Neill; 56 American Reports 557, 2 Atlantic, 586.

We respectfully submit that the burden is upon the Plaintiff in Error in this case to establish that the provision of Section 26, Title II of the National Prohibition Act is an unreasonable provision.

The Supreme Court of Kentucky held in the case of Keiper vs. the City of Louisville, in passing upon an ordinance adopted by the City of Louisville, which gave the right to the Police officers to enter and inspect any building or premises or place of any kind where food products are stored, or kept for sale, that:

> "While under the Constitution the people must be secure from unreasonable search there is nothing in the record to show that an unreasonable search was imposed upon the defendant * * * when the aid of the Court is invoked the person attacking the ordinance enacted under the police power must affirmatively show that as applied to him, it is unreasonable or oppressive"

(Keiper vs. City of Louisville, 154 Southwestern, page 19.)

The evidence establishes that defendant at the time of his arrest and the seizure of the liquor was actually engaged in the commission of a crime. He

was committing the crime by transporting the liquor and therefore the liquor and the automobile used for transporting same might be said to be the corpus of the crime. Section 26, Title II simply authorizes the seizure of the **corpus** of the crime and the arrest of the party found engaged in its commission.

Wherein does the Constitution of the United States, by reason of any of its provisions, safeguard or declare to be inviolate from seizure, the tools of a burglar or the implements or things used in the commission of a crime? Can it therefore be successfully maintained that a Statute which authorizes the seizure of the things by which a crime is committed; the very corpus of it, is unreasonable and violative of constitutional provision?

We earnestly insist that the record of this case clearly disclosed that the prohibition officers discovered Lambert in the unlawful transportation of intoxicating liquor and that under Section 26, Title II of the National Prohibition Act, they had a right to arrest Lambert and seize the liquor which was contained in the automobile.

The transcript further discloses that no search, as the word "search" is understood in law, was made by the prohibition officers prior to the seizure of the intoxicating liquor.

We respectfully submit that Section 26, Title II of the National Prohibition Act is not in contravention to the Fourth Amendment to the Constitution of the United States, and that the authority conferred upon the officers to make seizure of

intoxicating liquor unlawfully transported is not authorizing an unreasonable search or seizure.

Respectfully submitted,

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